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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MAURICIO CANJURA, Defendant and Appellant.	B288225 (Los Angeles County Super. Ct. No. LA 085044)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory A. Dohi, Judge. Affirmed.

Mark L. Christiansen, under appointment by the Court of Appeal for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Kristen J. Inberg, Deputy Attorney General, for Plaintiff and Respondent.

Mauricio Canjura appeals his conviction on one count of committing a lewd or lascivious act upon a child under the age of 14 in violation of Penal Code section 288, subdivision (a).[1] His sole contention on appeal is the trial court erred in failing to instruct the jury, sua sponte, on what Canjura contends is the lesser included offense of battery. But in *People v. Shockley* (2013) 58 Cal.4th 400 (*Shockley*), our Supreme Court held battery is *not* a lesser included offense of Section 288, subdivision (a). We therefore affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On December 24, 2016, J.R. (then age nine) went with her mother, sister (age seven) and brother (age five) to visit her paternal grandmother Maria R. Canjura, who was Maria's boyfriend, was at her apartment.

After they arrived, J.R.'s mother went into the kitchen. J.R. played with her sister, brother, and Canjura in the apartment's only bedroom, while her brother played a game on his phone. The two girls and Canjura played a game they called "Rescue." The girls were the "good guys" and Canjura was the "bad guy." The "bad guy" would throw one of the "good guys" on the bed, and the other "good guy" would rescue her.

J.R. wore overalls that were a bit large for her. At some point during the game Canjura stuck his hand through the gap on the side of her overalls. He first put his hands on the outside of her underpants, then reached inside her underpants and placed his finger between the outer lips of her vagina. J.R.

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[1] All further statutory references are to the Penal Code.

thought Canjura moved his finger back and forth. Canjura's conduct made J.R. feel uncomfortable.

When J.R.'s aunt arrived, the children came out of the bedroom. J.R. asked if they could leave. They ate some cake, and J.R. again asked to leave. J.R.'s mother thought this was unusual.

Before they left, Canjura asked J.R. whether she was going to tell anyone and she said "yes." And on the drive home, J.R. told her mother.

On December 26, 2016, Detective Saul Paredes of LAPD's Van Nuys division interviewed Canjura with Detective Rose in the room. The interview commenced in English but the majority was in Spanish. The prosecution played an audio recording of the interview to the jury and provided the jurors with a transcript containing an English translation.

During the interview, the detectives used a ruse, telling Canjura they found his fingerprint on J.R.'s underpants, although it is impossible to obtain a fingerprint from clothing. They also told him they had test results showing his DNA inside J.R.'s vagina, although they did not.

During this interview, Canjura stated he knew he was accused of touching one of the children inappropriately. He explained he was wrestling with one of the girls. She told him, "don't let me go, hold me by my overalls." The other girl jumped on him, he said, and his hand went inside J.R.'s overalls and brushed over her. He initially denied his hand was inside her underwear, and said J.R. closed her legs on his hand. He claims his hand got trapped between her legs. He was aware he touched her, but insisted it was unintentional.

Later in the interview, however, Canjura admitted, "Yes, I lost it. And well, I pulled her, her little underwear to one side and I touched her." When the detectives (falsely) told Canjura his DNA was found inside J.R.'s vagina, he theorized "maybe what felt wrong to her was when I moved her little underwear like this and then I touched her." Canjura eventually admitted to separating J.R.'s labia and rubbing her.

By information filed April 27, 2017, the People charged Canjura in count one with oral copulation or sexual penetration with a child (§ 288.7, subd. (b)) and in count 2 with a lewd act upon a child (§ 288, subd. (a)). The jury found Canjura guilty on count 2, and deadlocked on count 1. The court later declared a mistrial on count 1. The prosecution dismissed count 1 pursuant to a plea agreement, and—also pursuant to the plea deal—the court sentenced Canjura to a term of eight years on count 2.

DISCUSSION

As noted above, Canjura contends the trial court erred by failing to instruct the jury, sua sponte, on battery as a lesser included offense of Penal Code section 288, subdivision (a), committing a lewd or lascivious act upon a child under 14 years of age. But, as also noted above, *Shockley* holds battery is *not* a lesser included offense of that crime. (*Shockley*, *supra,* 58 Cal.4th at 406.) Canjura concedes *Shockley*'s holding, but argues it should not control in his case. As shown below, however, Canjura bases his argument on a misrepresentation of the record. We therefore reject it.

A trial court has a sua sponte duty to instruct on lesser included offenses supported by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154–155 (*Breverman).*)

Lesser included instructions are required only when a jury could reasonably conclude the defendant committed the lesser offense but not the greater one. (*People v. Hardy* (2018) 5 Cal.5th 56, 98.) Failure to instruct on a lesser included offense requires reversal only if an examination of the entire record establishes a reasonable probability the error affected the outcome of the trial. (*Breverman, supra,* 19 Cal.4th at p. 165.)

A lesser offense is included in a greater offense if one of two tests is met. Under the statutory elements test, where all of the statutory elements of the greater offense include all the elements of the lesser offense, the latter offense is included in the former. In such a case, it is not possible to commit the greater offense without committing the lesser offense. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227–1230.) Under the accusatory pleading test, if the allegations of the charging document establish that if the greater offense was committed, then the lesser offense must also have been committed, the latter offense is included in the former. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1035.) The accusatory pleading test arose to ensure that defendants receive notice before they can be convicted of an uncharged crime. The required notice of the lesser included offense is given when the specific language of the accusatory pleading adequately warns the defendant the People will seek to prove the elements of the lesser offense. (*People v. Reed, supra,* 38 Cal.4th at p. 1229.)

Section 288 provides that any person who willfully "commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is

guilty of a felony." Section 242 defines battery as "any willful and unlawful use of force or violence upon the person of another." Any harmful or offensive touching satisfies the element of unlawful use of force or violence for purposes of battery. (*People v. Pinholster* (1992) 1 Cal.4th 865, 961.) Thus, the issue here is whether a defendant can commit a lewd act without touching the victim in a harmful or offensive manner. (*People v. Sanders* (2012) 55 Cal.4th 731, 737 [in deciding whether an offense is necessarily included within another, the inquiry is whether the greater offense can be committed without also committing the lesser crime].)

Shockley, supra, 58 Cal.4th 400 held battery is not a lesser included offense of lewd conduct upon a child under 14 years of age. (*Id.* at p. 406.) *Shockley* was premised upon the statutory elements test because the accusatory pleading "simply tracked section 288 (a)'s language without providing additional factual allegations." (*Id.* at p. 404.) In *Shockley,* the prosecution argued a lewd act on a child need not always involve touching the victim in a harmful or offensive manner.[2] (*Ibid.*) The defendant contended that touching a child with lewd intent is inherently

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[2] That argument is correct. In *People v. Villagran* (2016) 5 Cal.App.5th 880, the court held that text messaging could violate section 288 because the touching under section 288 could be constructive. (*Id.* at p. 890.) The required touching could be done by the child on his or her own person provided it was caused or instigated by the perpetrator with lewd intent. (*Ibid.*) Thus, where the defendant texted explicit photographs of himself to girls under age 14, and requested they send him nude photos in return, he violated section 288. (*Id.* at p. 883, 894.) Therefore, a battery is not necessarily a lesser included of a lewd act because the defendant might not have actually touched the child, but nonetheless committed a lewd act.

harmful and objectively offensive, so every touching with lewd intent under section 288 also is harmful or offensive for purposes of section 242. Declining to resolve the specific argument the parties posed, *Shockley* found the defendant's argument conflated the offenses so they were identical: "If we were to agree with defendant, that would mean this form of battery (where lewd conduct supplies the harmful or offensive touching) is not a *lesser* and *included* offense of lewd conduct but is essentially the *identical* offense. If guilt of battery is predicated on guilt of lewd conduct—i.e., if a person is guilty of battery because that person committed lewd conduct—neither crime would have an element not also required of the other." (*Id.* at p. 405.) *Shockley* continued, "we merely conclude that when the elements of two offenses are essentially identical, as when guilt of battery would be predicated on being guilty of lewd conduct, neither is a lesser and included offense of the other." (*Id.* at p. 406.)

The accusatory pleading here tracked the statutory language, so *Shockley, supra,* 58 Cal.4th 400 is directly on point: Count 2 alleged defendant "willfully, unlawfully, and lewdly commit[ed] a lewd and lascivious act upon and with the body and certain parts and members thereof of [J.R.], a child under the age of fourteen years, with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of the said defendant and the said child." Thus, under *Shockley,* no lesser included instruction was required.

Nonetheless, Canjura argues *Shockley, supra,* 58 Cal.4th 400 is distinguishable because he "was specifically charged with illegally and intentionally, with a lewd intent, having touched 'the body and certain parts or members thereof of [J.R.].'" As a result, he argues, the charge against him contained an express

statement of a battery if he lacked lewd intent, putting him on notice that a battery could be charged. But Canjura mischaracterizes the record. Count 2 does *not* allege Canjura "touched" J.R. Rather, the charge tracks the statutory language and asserts only that he committed a lewd act upon her body. Thus it does not expressly contain the elements of a battery and *Shockley* controls.

Further, even if we were to conclude battery was a lesser included offense in this case, a battery instruction was not warranted on the evidence and defendant was not prejudiced by its exclusion. A "court need instruct the jury on a lesser included offense only '[w]hen there is substantial evidence that an element of the charged offense is missing, but that the accused is guilty of' the lesser offense. [Citation.]" (*Shockley, supra,* 58 Cal.4th at pp. 403-404.)

Here, substantial evidence established Canjura committed a lewd act upon J.R. J.R. testified defendant put his hands inside her underwear and touched her labia. Canjura admitted that after his hand went inside her overalls, he "lost it," pushed aside her underwear, and touched her labia. There was no harmful and offensive touching that was not lewd from which the jury could conclude defendant merely committed a battery. (*People v. Chenelle* (2016) 4 Cal.App.5th 1255, 1265 [lesser included instruction not required where evidence shows defendant is either guilty of the crime charged or not guilty of any crime].) As a result, it is not reasonably probable the result would have been different in the presence of the instruction. (*People v. Gonzalez* (2018) 5 Cal.5th 186, 195–196 [failure to instruct on lesser included reviewed under *Watson* standard].)

DISPOSITION

The judgment of the superior court is affirmed.

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CURREY, J.

We concur:

MANELLA, P.J.

COLLINS, J.